Comments

The Continued Viability of Ohio's Procedure for Legislative Review of Agency Rules in the Post-*Chadha* Era

I. INTRODUCTION

As the social and economic issues confronting our government have grown in number and complexity, legislative efforts to address these concerns have focused upon broad policy determinations. Consequently, legislatures have granted administrative agencies increasing authority over the implementation of these policies. Depending upon the particular enabling statute, administrative agencies may have authority to exercise legislative functions, judical functions, or both. Legislative functions are manifested in rulemaking, which involves the formulation of future law or policy; judicial functions are manifested in adjudicatory proceedings, which determine past and present rights and liabilities.[1] This Comment is concerned primarily with the rulemaking function of agencies.

The rulemaking authority of administrative agencies includes formulating, amending, and repealing rules.[2] Since this authority derives solely from the enabling statute, the legislature retains the power to limit or even to abolish such authority. Yet legislative supervision of administrative agencies through constant statutory modification of their authority is cumbersome. Indirect supervision of administrative

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1. *See* L. MODJESKA, ADMINISTRATIVE LAW: PRACTICE AND PROCEDURE 11–18 (1982).

The Supreme Court characterizes the basic distinction between rulemaking and adjudication as follows: "While the line dividing them may not always be a bright one . . . [there is] a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." United States v. Florida E.C.Ry., 410 U.S. 224, 245 (1973).

2. *See, e.g.*, 5 U.S.C. § 551(5) (1982 & Supp. III 1985); OHIO REV. CODE ANN. § 119.03 (Page 1984 & Supp. 1986).

The federal Administrative Procedure Act defines "rule" as "the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (1982 & Supp. III 1985). *See also* OHIO REV. CODE ANN. § 119.01(C) (Page 1984 & Supp. 1986) (defining "rule" as "any rule, regulation, or standard, having a general and uniform operation adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and . . . does not include any internal management rule of agency under the authority of the laws governing such agency, and . . . does not include any internal management rule of an agency unless the internal management rule affects private rights"); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:1 (2d ed. 1978) ("One may say with reasonable accuracy that 'rules' and 'regulations' are terms that are interchangeable . . . . [T]he common term 'rules and regulations' seems clearly redundant."). As used in this Comment, "rules" and "regulations" will have identical meanings.

Agency rules may be substantive, procedural, or interpretative. Substantive rules establish standards of conduct that have the force and effect of law. *See* United States v. Nixon, 418 U.S. 683 (1974). Procedural rules relate to internal agency organization, practice, and procedure and are binding only upon the agencies themselves. Interpretive rules represent an agency's interpretation of statutes and regulations, do not have the force of law, and are not binding. *See* Marshall v. W. & W. Steel Co., 604 F.2d 1322 (10th Cir. 1979). This Comment is concerned with substantive rules.

agencies through legislative budgetary pressure as well as intense scrutiny of executive appointments is equally unsatisfactory.[3]

A popular procedure for maintaining some modicum of control over agency rulemaking activities is the legislative veto.[4] With this mechanism, any grant of rulemaking authority is conditioned upon subsequent legislative review. In a bicameral legislature, there are four principal methods for structuring a legislative veto: (1) agency action can be precluded if either house of the legislature passes a resolution of disapproval; (2) agency action can be precluded if both houses pass a resolution of disapproval; (3) agency action can become effective only with the approval of either house; or (4) agency action can become effective only if approved by both houses.[5]

While legislative veto provisions have been heralded as a pragmatic method for restraining a burgeoning bureaucracy,[6] they have also been the targets of considerable criticism.[7] In 1983, the United States Supreme Court, in *Immigration and Naturalization Service v. Chadha*,[8] held that congressional use of the legislative veto violated the constitutional requirements of presentment and bicameralism as well as the doctrine of separation of powers. Although *Chadha* is only persuasive authority when examining the validity of Ohio's legislative veto procedure, the approaches taken by the various justices provide a useful analytical framework.

This Comment suggests that while the opinion of the Supreme Court in *Chadha* properly rejected the modern practice of enacting legislation without adequate standards to guide administrative agencies in promulgating rules,[9] it needlessly

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3. *See* Opinion of the Justices, 121 N.H. 552, 557, 431 A.2d 783, 786–87 (1981).

4. For a discussion of the historical development of the legislative veto, see Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953); Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

5. J. BOLTON, LEGISLATIVE VETO: UNSEPARATING THE POWERS 1–2 (1977). It is also possible to vest veto authority in certain legislative committees, see *infra* text accompanying notes 113–15, or in specific individuals, *see infra* text accompanying notes 118–20.

6. *See generally* Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Bosivert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638 (1957); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33 (1963); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U. L. REV. 1031 (1955); Stewart, *Constitutionlity of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976).

7. *See generally* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REG., Nov.-Dec. 1979, at 19; Comment, *supra* note 4.

8. 462 U.S. 919 (1983).

9. *See* Bruff & Gellhorn, *supra* note 7, at 1381–1409, 1426–28 (in five case studies of regulatory rulemaking, Congress left key issues unresolved in the authorizing statutes and relied on the legislative veto mechanism to maintain control over agency policy initiatives); Martin, *supra* note 7, at 268–71 (rather than make difficult policy choices concerninng the duty of local transit authorities to accomodate the disabled, Congress delegated this decision to the Department of Transportation, subject to congressional veto of unpopular regulations).

returned to the antiquated doctrine of absolute nondelegation.[10] Since the underlying concerns of the *Chadha* majority are alleviated by Ohio's legislative veto mechanism, the reasoning behind that opinion should not be applied to invalidate the Ohio procedure. This Comment traces the historical development of the nondelegation doctrine[11] and then examines both *Chadha*[12] and relevant state decisions.[13] In addition, the procedure for legislative review of agency rulemaking in Ohio is reviewed[14] and reasons for its continued use are articulated.[15]

II. The Historical Development of the Nondelegation Doctrine

The Constitution of the United States outlines three major aspects of governmental power: legislative, executive, and judicial; and vests each in a separate organ of government.[16] While the Constitution plainly embodies a system of separate power,[17] it does not explicitly state the precise manner in which these powers are to be separated.[18] During the debates over the federal Constitution, a tension emerged between the purist's belief that tyrannical abuses of authority could only be avoided by the absolute separation of powers[19] and the pragmatist's desire to accommodate the realities of governing by requiring only that one branch not exercise the *entire* power of another.[20] Decisions of the Supreme Court have made it clear that the pragmatist's view has prevailed.[21]

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10. *See infra* text accompanying notes 24–26, 85–87.

11. *See infra* text accompanying notes 16–42. The nondelegation doctrine refers to the principle used by courts to constrain the transfer of legislative authority to administrative agencies. The term is synonymous with the delegation doctrine.

12. *See infra* text accompanying notes 43–87.

13. *See infra* text accompanying notes 88–130.

14. *See infra* text accompanying notes 131–55.

15. *See infra* text accompanying notes 156–98.

16. *See* U.S. Const. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress. . . ."); U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President . . . ."); U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts . . . .").

17. *See supra* note 16. *See also* A. Vanderbilt, The Doctrine of Separation of Powers and its Present Day Significance (1953); Parker, *The Historical Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L. Rev. 449 (1958); Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385 (1935).

18. *Cf.* Mass. Const. of 1780, art. XXX:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; The executive shall never exercise the legislative and judicial, or either of them; The judicial shall never exercise the legislative and executive, or either of them; to the end it may be a government of laws and not of men.

19. *See, e.g.*, B. DeMontesquieu, The Spirit of the Laws 202 (D. Carrithers ed. 1977):

> When the legislative and executive powers are united . . . in the same body, then there can be no liberty; . . . lest the same monarch or senate should enact tyrannical laws, [and] execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. Miserable indeed would be the case . . . were the same body . . . to exercise those powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.

20. *See* The Federalist No. 47 (J. Madison) (arguing that the Constitution prohibits only the exercise by one branch of the whole power of another); The Federalist No. 48 (J. Madison) ("[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of one of the other departments.").

21. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976) ("[T]he Constitution by no means contemplates total separation

This view of the separation of powers is expressed in the doctrine of nondelegation, which provides that the powers of one branch of government should not be wholly delegated to another branch.[22] Although nondelegation theoretically applies to any transfer of governmental power to a coordinate branch, it has figured most prominently in the transfer of legislative power to the executive branch.[23]

The delegation of legislative power is an old concern, predating the federal Constitution and even the principle of separation of powers. According to John Locke, the legislature was prohibited from transfering its authority to make laws to anyone else:

> The power of the Legislative being derived from the People by a positive voluntary grant . . . can be no other than what the positive grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.[24]

Locke's insistence that legislators could not delegate their authority derived from the rule of agency law that power transferred by a principal to an agent cannot be redelegated by the agent, since such a redelegation would conflict with the original transfer.[25] Under such a principle of absolute nondelegation,[26] the legislature may not delegate to the executive any discretionary authority regarding policy determinations. Thus, the role of the legislature is to make all policy determinations, and the role of the executive is limited to the mechanical enforcement of laws enacted by the legislature.

Prior to *Chadha*, the United States Supreme Court had never embraced this principle of absolute nondelegation when assessing the extent to which the legislature could permissibly delegate some of its authority to the executive branch. Initially, the Supreme Court upheld delegations of legislative power to the executive on the rationale that the transferred authority was limited to making a factual determination,[27] to acting on a specific contingency,[28] or to filling in certain details pertinent

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of each of these three essential branches of Government . . . . [A] hermetic sealing off of the three branches of government from one another would preclude the establishment of a Nation capable of governing itself effectively."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separation but interdependence, autonomy but reciprocity.").

22. *See* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28–33 (1965); Aranson, Gelhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982). Yet separation of powers and nondelegation are not completely synonymous since the doctrine of separation of powers can be violated in ways that do not involve delegation. For example, alleged usurpations of powers belonging to one branch of government by a coordinate branch may violate the separation of powers principle but do not necessarily involve delegations of power. *See, e.g.*, Bowsher v. Synar, 478 U.S._____, 106 S. Ct. 3181 (1986) (the grant of authority to determine program-by-program budget reductions to the comptroller general constituted an unconstitutional usurpation by Congress of executive branch functions).

23. *See* Aranson, Gellhorn & Robinson, *supra* note 22, at 3–4.

24. J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ¶ 141 (1690).

25. *See* Aranson, Gellhorn & Robinson, *supra* note 22, at 4.

26. The term "absolute nondelegation" is used to describe the principle that each branch of government is strictly precluded from delegating *any* of its authority to a coordinate branch. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:10 (2d ed. 1978); Jaffe, *An Essay on Delegation of Legislative Power* (pts. I & II), 47 COLUM. L. REV. 359, 561 (1947).

27. Field v. Clark, 143 U.S. 649 (1892) (upholding a provision of the Tariff Act of 1890 authorizing the President to suspend favorable tariff treatment for nations that subjected American goods to "any duties or other exactions . . . which . . . [he] may deem to be reciprocally unequal and unreasonably. . . .").

28. The Brig Aurora, 11 U.S. (7 Cranch) 382, 386 (1813) (rejecting an argument that a statute authorizing the

to the legislative purpose.[29] The Court subsequently opted to enforce the spirit of separation of powers by enforcing the standards requirement, which permitted the delegation of legislative powers to administrative agencies[30] only if reasonably specific standards accompanied the grant of authority.[31] Thus, whenever Congress "shall lay down . . . an intelligible principle to which the person or body authorized to . . . [proceed] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[32] Moreover, the standards must be "sufficiently definite and precise" to provide a reviewing court with the ability "to ascertain whether the will of Congress has been obeyed."[33] During the New Deal era, the Supreme Court invalidated congressional delegation of legislative authority to executive agencies on three separate occasions for lack of specific standards.[34] During this period, the nondelegation doctrine became identified with other theories, such as substantive due process and a restrictive reading of the commerce clause, used by the Court to invalidate reform legislation.[35] When many of these decisions were subsequently overruled and the underlying theories discredited, the nondelegation principle was relegated to "fugitive existence."[36]

As a result, the Supreme Court has not invalidated any federal legislation on the basis of an impermissible delegation of legislative authority during the past fifty years.[37] Indeed, the Court has refrained from invalidating delegations of legislative power even when explicit standards were lacking.[38] The lax enforcement of the

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President to terminate a trade embargo on France and England if the two nations ceased violating "the neutral commerce of the United States" delegated too much discretion to the executive branch).

29. United States v. Grimaud, 220 U.S. 506 (1911) (upholding the authorization of the Secretary of Agriculture to promulgate rules governing the use of national forests).

30. *See* J. COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 15–17 (1927) (the advantages of delegating legislative power to administrative agencies are: greater knowledge of what will work; increased speed; more flexibility; greater permanence, continuity, and scientific value; and additional saving of legislature's time for general policy making).

31. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

Id. at 421.

32. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

33. Yakus v. United States, 321 U.S. 414, 425–26 (1944).

34. Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). These remain the only cases in which the nondelegation doctrine has been explicitly used to invalidate federal legislation.

35. *See* R.H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 48–123 (1949).

36. Aranson, Gellhorn & Robinson, *supra* note 22, at 22. Although the nondelegation principle fell from judicial favor, commentators did not completely abandon it. *See* J. ELY, DEMOCRACY AND DISTRUST 131–34 (1980); Scalia, *A Note on the Benzene Case*, 4 REG., July-Aug. 1980, at 25, 27–28.

37. J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM—CASES AND MATERIALS 6 (2d ed. 1985).

38. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963) (upholding a grant of essentially standardless power to the Secretary of the Interior to apportion the waters of the Colorado River); Lichter v. United States, 334 U.S. 742, 783–87 (1948) (upholding the Renegotiation Act, which granted executive agencies authority to recover "excessive profits" from defense contractors without explictly defining the term "excessive"); National Broadcasting Co. v. United

standards requirement has been primarily an acknowledgement that meaningful standards are not feasible in every circumstance, and that it is not possible to develop standards for unforeseeable situations. The effect of the Court's limited application of the standards requirement has been to facilitate the congressional enactment of legislation lacking any meaningful standards.[39]

In *Industrial Union Department v. American Petroleum Institute*,[40] however, some members of the Court expressed a willingness to resurrect the nondelegation principle.[41] It was in this changing climate of broad legislative delegations of discretionary authority to administrative agencies and of increasing judicial rumblings in favor of reviving the nondelegation principle that the Supreme Court considered *Immigration and Naturalization Service v. Chadha*.[42]

III. *IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA*

Jagdish Rai Chadha was an East Indian, who came to the United States in 1966 on a student visa and then stayed beyond its expiration.[43] While technically deportable, Mr. Chadha sought to have his deportation suspended pursuant to the Immigration and Nationality Act.[44] Under the provisions of the Act, the United States Attorney General could suspend the deportation of certain qualifying aliens.[45] The

States, 319 U.S. 190, 225–26 (1943) (upholding a statute authorizing the Federal Communications Commission to license radio communications "as public convenience, interest or necessity requires").

39. *See, e.g.*, The Resource Conservation and Recovery Act of 1976, §§ 3001–11, 42 U.S.C. §§ 6921–31 (1982 & Supp. 1987) (granting authority on the administrator of the Environmental Protection Agency to regulate the generation, transportation, treatment, and disposal of all "hazardous materials," without defining "hazardous materials"). *See also supra* note 9.

40. 448 U.S. 607 (1980). This case is frequently referred to as the *Benzene Case*.

41. In the *Benzene Case*, the Court considered a provision of the Occupational Safety and Health Administration Act that required the Secretary of Labor to set exposure limits for toxic materials in the workplace that would "most adequately assure, to the extent feasible . . . that no employee will suffer material impairment" of his or her health. Occupational Safety and Health Administration Act of 1970, § 6, 29 U.S.C. § 655(b)(5) (1982 & Supp. 1987). The plurality opinion invoked the nondelegation doctrine to justify its interpretation of a statutory section defining occupational safety standards as conditions "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8) (1982 & Supp. 1987). The plurality warned that unless the definition was read to include a requirement that OSHA act only to eliminate significant risks, the agency would be limited only by the remaining statutory constraint of feasibility. Because that interpretation would give OSHA the power to impose enormous clean-up costs, the plurality feared that "such a sweeping delegation of legislative power . . . might be unconstitutional under the Court's [nondelegation doctrine]." Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980). Justice Rehnquist in a separate concurrence explicitly held that the statutory provision violated the nondelegation doctrine. *Id.* at 672 (Rehnquist, J., concurring).

Furthermore, in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), the Court decided that the statutory reference to "feasibility" did not require a cost-benefit anlaysis to justify imposition of an exposure standard for cotton dust. *Id.* at 509. The dissent argued that the statutory provision violated the nondelegation doctrine. *Id.* at 543 (Rehnquist, J., dissenting). *See* Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1204 n.176 (1981).

42. 462 U.S. 919 (1983).

43. *Id.* at 923.

44. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1254 (1982 & Supp. 1987)). This legislation was enacted in response to the common congressional practice in the 1930's of passing private immigration bills to allow certain aliens to remain in the country. *See* B. CRAIG, THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION 34 (1983).

45. 8 U.S.C. § 1254 (1982 & Supp. 1987). This section provides:

> [T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence . . . [when the alien is deportable for reasons other than criminal or subversive activity and has been present in the United States for seven years] and proves that during all of such period he was and is a person of good moral character, and is a person whose deportation would, in the

suspension would be effective, however, only if neither the House of Representatives nor the Senate approved a resolution repudiating the suspension during the following two sessions of Congress.[46]

On June 25, 1974, an immigration judge of the Department of Justice's Immigration and Naturalization Service (INS), found that Mr. Chadha satisfied the requirements for a compassionate suspension of deportation.[47] As required by the statute, the Attorney General, through the INS, transmitted to Congress a report of its order suspending the deportation of Mr. Chadha.[48] On December 12, 1975, one week before the statutory time period would have expired and Mr. Chadha would have been granted permanent resident alien status, House Resolution 926 was introduced.[49] The resolution stated that "the House of Representatives does not approve of granting permanent residence in the United States to the aliens hereinafter named."[50] Mr. Chadha and five others were specifically named and the resolution was subsequently approved without debate or significant explanation.[51] The effect of the resolution's passage was to reinstate the prior deportation order. When an INS hearing was held to implement the order, Mr. Chadha moved to terminate the proceeding on grounds that the House action was unconstitutional.[52] Following the dismissal of his claim, Mr. Chadha appealed his case to the United States Court of Appeals for the Ninth Circuit.[53]

The Ninth Circuit concluded that the Act's legislative veto procedure violated the constitutional principle of separation of powers since it operated as "a prohibited legislative intrusion upon the executive and judicial branches."[54] In reaching this conclusion, the court relied upon an analytical framework previously established by the Supreme Court.[55] Recognizing that the test to be applied was a "functional" one,[56] the Ninth Circuit held that the legislative veto accorded Congress powers central to its coordinate branches;[57] that congressional exercise of these powers would disrupt the other branches' performance of their duties;[58] and that such a reallocation of power was not necessary to implement any valid governmental policy.[59]

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opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

46. 8 U.S.C. § 1254(c)(2) (1982 & Supp. III 1987).

47. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 924 (1983).

48. *Id.*

49. 121 CONG. REC. 40,247 (1975).

50. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

51. *See id.*

52. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 928 (1983).

53. *Id.*

54. Chadha v. Immigration and Naturalization Servs., 634 F.2d 408, 420 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

55. *See* Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 441–46 (1977) (in determining whether the Presidential Recordings and Materials Preservation Act disrupts the proper balance between the coordinate branches of government, the proper inquiry focuses on the extent to which the Act prevents the executive branch from accomplishing its constitutionally assigned functions; if the potential for disruption is present, it must be determined whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress).

56. Chadha v. Immigration and Naturalization Serv., 634 F.2d 408, 429 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

57. *Id.* at 430.

58. *Id.* at 431.

59. *Id.* at 432–33.

The Supreme Court, however, ignored the functional approach to separation-of-powers issues endorsed in previous decisions.[60] Instead, Chief Justice Burger's opinion of the Court hinged upon characterizing the House passage of the resolution as a "legislative act," and thus subject to the formal requirements of article I of the Constitution.[61]

Focusing solely on the identity of the actor, the majority opinion presumed that the veto was an exercise of legislative power.[62] The Court then proceeded to state the circumstances that rendered the veto "legislative in its character and effect."[63] In the majority's view, Mr. Chadha would have remained in the United States absent House action.[64] Passage of the resolution, therefore, effectively mandated Mr. Chadha's deportation. Since the House action "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the legislative branch," the majority concluded that the action was legislative in character.[65]

After classifying the House passage of the resolution as legislative in character, the Court asserted that the action must satisfy the requirements of presentment and bicameralism, unless specifically exempted under the Constitution.[66] Since the one-house legislative veto was not specifically excepted by the Constitution, failure to comply with presentment and bicameralism rendered the procedure unconstitutional.[67] Moreover, by basing its decision on presentment and bicameralism concerns, the majority's decision seemingly invalidated every use of the legislative veto. Indeed, less than two weeks later, the Court summarily affirmed two appellate court decisions invalidating other congressional legislative vetoes.[68]

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60. *See supra* note 55.

61. The principal procedural requirements for enacting legislation are approval by both the House of Representatives and the Senate as well as presentment to the President for approval or possible veto. *See* U.S. CONST. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . .").

See also Goldsmith, INS v. Chadha *and the Nondelegation Doctrine: A Speculation*, 15 SYRACUSE L. REV. 749, 752 (1984). Professor Goldsmith suggests the Court's reasoning took the form of a simple syllogism—major premise: when Congress engages in "law making" it may do so only in accordance with the procedural requirements of article I; minor premise: the exercise of the legislative veto was "law making" that did not comply with article I; conclusion: the exercise of the legislative veto was unconstitutional.

62. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951–52 (1983). ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it . . . When the Executive acts, it presumptively acts in an executive or administrative capacity. . . . And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.").

63. *Id.* at 952.

64. *Id.*

65. *Id.* The majority also cited as evidence of the legislative character of the House's action the policy-making nature of the decision to deport Mr. Chadha. *Id.* at 954.

66. Although the majority recognized that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Article I," *id.* at 952; it noted that exceptions from bicameralism and presentment were limited to four provisions in the Constitution: the power of the House of Representatives to initiate impeachments, U.S. CONST art I, § 2, cl. 5; the power of the Senate to conduct trials following impeachment and to convict following trial, U.S. CONST. art. I, § 3, cl. 6; the power of the Senate to approve or to disapprove Presidential appointments, U.S. CONST. art. II, § 2, cl. 2; the power of the Senate to ratify treaties negotiated by the President, U.S. CONST. art. II, § 2, cl. 2.

67. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

68. Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983), *aff'g* Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982); United States Senate v. Federal Trade Comm'n, 463

In a separate concurrence, Justice Powell resolved the case in a less sweeping manner. In his view, the doctrine of separation of powers could be violated in two ways. One branch could impermissibly interfere with another's performance of constitutionally assigned functions,[69] or one branch could assume a function that is more properly entrusted to another.[70] By focusing on the nature of the House's decision—"that six specific persons did not comply with certain statutory criteria"—Justice Powell concluded that the House assumed a function ordinarily entrusted to the courts.[71] Thus, in determining that particular persons did not satisfy the requirements for permanent residence in this country, the House "assumed a judicial function in violation of the principle of separation of powers."[72]

Dissenting, Justice White disputed the majority's contention that all exercises of legislative power are required to comply with presentment and bicameralism.[73] In his view, "[i]f the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or 'quasi-legislative' in character, I cannot accept that Article I . . . should forbid Congress to qualify that grant with a legislative veto."[74] Moreover, Justice White felt that the legislative veto procedure in question preserved the interests of bicameralism and presentment because a permanent change in a deportable alien's status could be accomplished only with the concurrence of the House, the Senate, and the executive branch.[75]

Justice White was equally troubled by the practical effect of the majority opinion.[76] He perceived the legislative veto as a valuable tool for facilitating the delegation of limited legislative powers in the modern administrative state.[77] According to Justice White,

> [w]ithout the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing with

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U.S. 1216 (1983), *aff'g* Consumers Union v. Federal Trade Comm'n, 691 F.2d 575 (D.C. Cir. 1982). At issue in these cases were rulemaking by executive and independent agencies as well as a two-house legislative veto.

69. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 433 (1977); United States v. Nixon, 418 U.S. 683 (1974).

70. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); Springer v. Philippine Islands, 277 U.S. 189 (1928).

71. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 965 (1983) (Powell, J., concurring).

72. *Id.* at 960. *Cf.* Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 803–04 (suggesting that Justice Powell did not find the statute objectionable on the basis of an infringement of judicial power, but rather on the grounds that forcing Mr. Chadha to submit to the possibility of an adverse congressional judgment about the facts of his particular case would be decidedly unfair and contrary to the principle of protecting citizens against governmental tyranny).

73. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 984 (1983) (White, J., dissenting) ("The Court's holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups.").

74. *Id.* at 989.

75. *Id.* at 990–97.

76. *Id.* at 1002 ("Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.").

77. *Id.* at 972–73 ("[T]he legislative veto is more than 'efficient, convenient, and useful.' It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking.").

> the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policy-making by those not elected to fill that role.[78]

While the result reached by the majority in *Chadha* severely restricted Congress' ability to legislate effectively,[79] the majority's reasoning is also susceptible to attack. For instance, the characterization of the House action as "altering legal rights" begs the question in Mr. Chadha's case. In reaching this conclusion, the majority opinion assumes that the Attorney General's suspension of Mr. Chadha's deportation is distinct from the House adoption of the resolution. When so perceived, the passage of the resolution repeals existing legal rights. Yet under the statutory scheme enacted by Congress,[80] Mr. Chadha's right to remain in the United States could be conferred only if the Attorney General so recommended *and* only if neither house of Congress exercised its review power. Between the suspension of the deportation and the end of the time period for legislative oversight, Mr. Chadha had no legal right to remain in the country. In this context, the House's passage of the resolution no more altered previously existing legal rights than the Attorney General's decision not to suspend deportation. Thus, the majority's claim that Mr. Chadha acquired a legal right that the House allegedly took away merely asserts its own assumption.[81]

Furthermore, the definition of legislative act adopted by the majority has been sharply criticized as functionally inadequate.[82] The characteristic cited by the Court as indicative of legislative acts, the "altering of legal rights," hardly distinguishes legislative acts from those of the executive or judiciary. Courts alter legal rights, duties, and relations of persons when they pronounce their judgments, as do executive officials when they enforce the laws. Thus, the alteration of legal rights does not in a functional sense differentiate between the actions of the legislature and those of the coordinate branches of government.

Moreover, the majority's equating of "altering legal rights" with the legislative requirements of presentment and bicameralism has not been demonstrated in practice. For example, congressional acts that alter legal rights, even if done in accordance with article I prescriptions, will not be permitted if a court determines that the acts are not legislative in character.[83] In addition, Congress has the recognized, albeit limited,

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78. *Id.* at 968.

79. Shortly after the *Chadha* decision, the House overwhelmingly adopted a bill replacing the requirement that rules adopted by the Consumer Product Safety Commission be subject to the possiblity of a legislative veto with two less desirable alternatives. The first alternative was that no rule would become effective until enacted by Congress in statutory form (thereby essentially depriving the Commission of its rulemaking authority and burdening Congress with the responsibility to adopt rules); and the second was that proposed rules could not take effect for a period of ninety "legislative days," during which Congress could enact a statute of disapproval (thereby prolonging the procedure for potentially indefinite periods). H.R. 2668, 98th Cong., 1st Sess., 129 CONG. REC. H4758–84 (1983).

80. *See supra* text accompanying notes 44–46.

81. *See* Strauss, *supra* note 72, at 796.

82. *See* Strauss, *supra* note 72, at 794–804; Tribe, *The Legislative Veto Decision: A Law by Any Other Name*, 21 HARV. J. ON LEGIS. 1, 9–10 (1984). The Court's definition of legislative act has also been criticized as resulting from an arbitrarily strict construction of the text of the Constitution. *See* Smolla, *Bring Back the Legislative Veto: A Proposal for a Constitutional Amendment*, 37 ARK. L. REV. 509, 515–16 (1983); Note, INS v. Chadha: *The Future Demise of Legislative Delegation and the Need for a Constitutional Amendment*, 11 J. LEGIS. 317, 334–35 (1984).

83. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 315 (1946) ("[L]egislative acts, no matter what their form,

authority to act in ways that alter legal rights and duties of persons outside the legislative branch without resorting to bicameral action or presentment. For example, in both the investigation of possible legislation and the exercise of oversight functions, Congress has authority to command the presence of witnesses and to attach consequences to their failure to cooperate.[84]

Finally, characterizing the House action as "altering legal rights" presumes the reassertion of the doctrine of absolute nondelegation.[85] Since the characteristic "altering legal rights" does not meaningfully distinguish between legislative and executive actions,[86] it can only define legislative action when the nondelegation principle is so strictly applied that executive action is restricted to the mere mechanical enforcement of the law. Yet absolute nondelegation expressly contradicts the premise underlying the modern administrative state that the executive branch may exercise discretion in implementing legislative policy.[87]

IV. State Judicial Decisions Concerning the Legislative Veto

The highest courts in six states have considered the constitutionality of their respective procedures for legislative review of agency rulemaking.[88] While there is virtual unanimity in their opinion that the legislative veto is unconstitutional, the reasons for reaching this conclusion vary. Generally, the decisions tend to stress either or both of the principles alluded to in *Chadha*, namely presentment[89] and separation of powers.[90]

The first state to consider the constitutionality of its legislative veto procedure within the context of agency rule review was Alaska.[91] The statute at issue permitted

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that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.").

84. *See* Strauss, *supra* note 72, at 795. *See also* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (congressional investigatory power described as a necessary and inevitable adjunct of the legislative process).

85. Several commentators have recognized the importance of absolute nondelegation to the Court's reasoning. *See* Goldsmith, *supra* note 61, at 751–61; Note, Chadha *and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 Yale L.J. 1493, 1501–02 (1985). For a discussion of the doctrine of absolute nondelegation, see *supra* text accompanying notes 24–26.

86. *See supra* text accompanying note 82.

87. *See* Note, *supra* note 85, at 1498.

88. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), *see infra* text accompanying notes 91–94; State *ex rel.* Stephan v. Kansas House of Representatives, 236 Kan. 45, 687 P.2d 622 (1984), *see infra* text accompanying notes 95–98, 103–07; Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984), *see infra* text accompanying notes 126–30; Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981), *see infra* text accompanying notes 118–25; General Assembly of the State of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982), *see infra* text accompanying notes 98–102, 108–12; State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981), *see infra* text accompanying notes 113–17.

See also Gary v. United States, 499 A.2d 815 (D.C. 1985) (striking down provisions of the Home Rule Act that allowed Congress to invalidate certain actions taken by the District of Columbia government); *cf.* Maloney v. Pac, 183 Conn. 313, 439 A.2d 349 (1981) (avoiding a decision as to the constitutionality of the legislative veto by holding that municipal traffic regulations are not subject to review by the state Legislative Regulation Review Committee); Holly Care Center v. State Dept. of Employ., 714 P.2d 45, 51 (Idaho 1986) (specifically declining to address the constitutionality of a legislative veto, holding only that legislative approval of an administrative rule has no binding legal effect upon a court).

89. *See supra* text accompanying notes 61–67.

90. *See supra* text accompanying notes 54–59.

91. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). *Cf.* Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950) (statute which provided that an executive reorganization plan proposed by the governor would become

the legislature to invalidate an agency rule through the adoption of a concurrent resolution.[92] Since the statute did not include any standards for the review of agency rules, the legislature could invalidate rules for any reason.

The Alaska Supreme Court, in a three-two decision, held that when the state legislature wishes to "take action having a binding effect on those outside the legislature" it may do so only by following the enactment procedures set forth in the state constitution.[93] In the case before it, the court found, seemingly by assumption, that the repeal of revenue commission rules concerning prize limits awarded by charitable organizations in fundraising lotteries constituted a legislative act. Since the adoption of the concurrent resolution invalidating these rules violated state constitutional provisions governing the mechanics of enacting legislation, the court concluded that the legislative veto statute was unconstitutional.[94]

The Kansas and New Jersey Supreme Courts also explictly relied upon constitutional requirements concerning the mechanics of legislative enactment in declaring their respective states' legislative veto provisions unconstitutional. Under the Kansas procedure, the legislature had total and absolute control to adopt, modify, reject, or revoke administrative rules and regulations by concurrent resolution.[95] Citing *Chadha*, the Kansas Supreme Court classified the adoption of such a resolution as a legislative act since the legal rights and duties of persons outside the legislative branch would be affected.[96] Because a resolution's passage would fail to comply with the legislative enactment prescriptions in the Kansas Constitution, the procedure was declared in violation of the state presentment clause.[97]

Similar reasoning was employed in the consideration of New Jersey's legislative veto procedure. The New Jersey Legislative Oversight Act[98] required nearly every rule proposed by a state agency to be submitted to the legislature. The proposed rule was then referred to a standing committee that had forty-five days in which to report its recommendation to the full house.[99] A rule was deemed approved unless the legislature adopted a concurrent resolution nullifying the rule within sixty days of its receipt.[100] The Supreme Court of New Jersey ruled that the legislature's power to block the effectiveness of any promulgated rule was equivalent to amending or repealing existing law.[101] Since legislative action could not have substantial policy-

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law only if the state legislature did not disapprove the plan by concurrent resolution was declared in violation of the enactment provisions of the state constitution).

92. ALASKA STAT. § 44.62.320(a) (1984 & 1986 Supp.) ("The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.").

93. State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 773 (Alaska 1980).

94. *Id.* at 770. *Cf.* State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 780 (Alaska 1980) (Boochever, C.J., dissenting) (since the adoption of agency rules is not subject to the constitutonal requirements applicable to legislation, it is inconsistent to demand these formalities when invalidating agency rules by resolutions).

Both the 11th and 13th Alaska legislatures proposed state constituional amendments to permit a legislative veto. The Alaska voters rejected the proposals in the 1980 and 1984 elections. ALASKA STAT. § 44.62.320(a) (1984 & 1986 Supp.).

95. KANSAS STAT. ANN. § 77–426 (1965) *amended by* 1985 Kan. Sess. Laws 1347–49.

96. State *ex rel.* Stephan v. Kansas House of Representatives, 236 Kan. 45, 64, 687 P.2d 622, 638 (1984).

97. *Id.*

98. N.J. STAT. ANN. §§ 52:14B-4.1–52:14B-4.9 (West 1986).

99. N.J. STAT. ANN. § 52:14B-4.2 (West 1986).

100. N.J. STAT. ANN. § 52:14B-4.3 (West 1986).

101. General Assembly of the State of N.J. v. Byrne, 90 N.J. 376, 388, 448 A.2d 438, 444 (1982).

making effect without a majority vote of both houses of the legislature and the approval of the Governor, the Legislative Oversight Act was held to violate the presentment clause of the New Jersey Constitution.[102]

Yet both the Kansas and New Jersey Supreme Courts adopted a two-fold analysis, basing their invalidation of the legislative veto procedures upon separation of powers principles as well as presentment clause concerns. In determining whether the Kansas procedure[103] established a violation of the separation of powers doctrine, the Kansas Supreme Court considered four factors: "(a) the essential nature of the power being exercised; (b) the degree of control by one department over another; (c) the objective sought to be attained by the legislature; and (d) the practical result of the blending of powers as shown by actual experience over a period of time."[104] In applying this functional analysis, the Kansas Supreme Court held that the power to promulgate rules was essentially executive or administrative in nature, not legislative.[105] Moreover, the court also ruled that the apparent objectives and actual results of the procedure were to vest "total and absolute control" in the legislature over the modification, rejection, or revocation of agency rules as well as to exclude executive branch participation in this area.[106] Upon consideration of these factors, the court concluded that the legislative veto procedure constituted a significant interference by the legislative branch with executive branch functions and consequently was an unconstitutional violation of separation of powers.[107]

The Supreme Court of New Jersey similarly found that the Legislative Oversight Act[108] was an unconstitutional violation of separation of powers.[109] By empowering the legislature to revoke virtually all proposed agency rules, the court concluded that this Act allowed the legislature to intrude upon the chief function of executive agencies—the implementation of statutes through the adoption of regulations.[110] The New Jersey Supreme Court explicitly stated, however, that the separation of powers doctrine permits some legislative oversight and participation in executive action: "Our holding here does not foreclose all legislative veto provisions."[111] In the court's view, when legislative action is necessary to further a statutory scheme requiring cooperation between the legislative and executive branches and such action presents no interference with exclusive executive functions, a legislative veto passes constitutional muster.[112]

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102. *Id.*

103. *See supra* text accompanying note 95.

104. State *ex rel.* Stephan v. Kansas House of Representatives, 236 Kan. 45, 59–60, 687 P.2d 622, 635 (1984) (*citing* State *ex rel.* v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976)).

105. State *ex rel.* Stephan v. Kansas House of Representatives, 236 Kan. 45, 60, 687 P.2d 622, 635 (1984). [The power to adopt rules] is delegated to the executive branch by law. This is not to say the legislature cannot modify the statute which grants an agency the authority to adopt regulations. Once the legislature delegated by law a function to the executive, it may only revoke that authority by the proper enactment of another law . . . .

106. *Id.*

107. *Id.*

108. *See supra* text accompanying notes 98–100.

109. General Assembly of the State of N.J. v. Byrne, 90 N.J. 376, 385, 448 A.2d 438, 444 (1982).

110. *Id.* at 386, 448 A.2d at 443.

111. *Id.* at 395, 448 A.2d at 448.

112. *Id. See, e.g.* Enourato v. New Jersey Bldg. Auth., 90 N.J. 396, 448 A.2d 449 (1982) (approving the legislative veto provisions included in the New Jersey Building Authority Act; the veto powers at issue were limited to the approval

A slightly different procedure for agency rule review confronted the West Virginia Supreme Court in a case involving the repeal of surface mining and reclamation regulations.[113] Under the challenged procedure, an agency rule would not become effective until it had been presented to the Legislative Rule-Making Review Committee.[114] The committee, comprised of twelve legislators, had six months from the date of presentation in which to approve or disapprove the proposed regulation. While the legislature was authorized either to sustain or to reverse the committee's action, it was not required to do so. Thus, the committee's decision to veto a proposed rule, although technically only a recommendation to the full legislature, was usually final.[115]

In holding the procedure invalid, the West Virginia Supreme Court stated that when the legislature exercises its power to void or amend administrative rules, it must act collectively rather than as a committee.[116] The court specifically recognized that not all legislative review of agency rulemaking is necessarily invalid:

> Legislative rule-making review has purpose and merit and may be beneficially exercised and employed when contained within its proper and constitutional sphere. . . . We do not question that some procedure for review of agency rules and regulations may well be warranted, but we must require that it be done within the limits of the separation of powers doctrine and according to the system of checks and balances in our governmental framework.[117]

Similar concerns about the wholesale shifting of legislative power were raised in a decision of the New Hampshire Supreme Court.[118] There, the New Hampshire House of Representatives asked the court to render an advisory opinion concerning the constitutionality of legislation that would establish a procedure for legislative review, and either acceptance or rejection, of rules proposed by state administrative agencies. Under the plan, an administrative agency would be required to notify the legislative leadership whenever it contemplated the promulgation of new rules. The proposed rules would then be submitted to a standing committee in each house of the legislature. If the proposed rules were neither approved nor rejected by a quorum of both committees within thirty days of their submission, they would be deemed approved.[119] The president of the senate and the speaker of the house of representatives, however, could agree to waive the requirement of committee approval, in which case the rule would become effective without any committee review whatsoever.[120]

The Supreme Court of New Hampshire ruled that the proposed legislation was unconstitutional because it delegated legislative authority to a smaller legislative

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or rejection of building projects and leases that required continuing legislative support and thus were distinguishable from the sweeping "revoke at will" provisions of the Legislative Oversight Act).

113. State *ex rel.* Barker v. Manchin, 279 S.E. 2d 622 (W. Va. 1981).

114. W. VA. CODE § 29A-3-11 (1986).

115. State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 632–33 (W. Va. 1981).

116. *Id.* at 633.

117. *Id.* at 634–35.

118. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

119. *Id.* at 555–56, 431 A.2d at 785.

120. *Id.* at 559, 431 A.2d at 788.

body.[121] "Although the legislature may delegate a portion of the legislative authority to an administrative agency . . . , it may not delegate its lawmaking authority to a smaller legislative body and thereby evade the [constitutional requirements] for action . . . ."[122]

While holding the creation of this particular legislative veto provision to be unconstitutional, the court stated that a legislative veto is not per se unconstitutional. The court acknowledged that New Hampshire law permitted the legislature to delegate the power to promulgate rules necessary for the proper execution of the laws to administrative agencies.[123] In the court's view, the rulemaking authority that may be delegated by the legislature is limited to the filling in of details necessary to effectuate the purpose of the statute. Since the legislature may delegate some of its lawmaking authority to administrative agencies, the court concluded that the legislature may properly condition the exercise of this authority upon legislative approval.[124] Thus, the New Hampshire Supreme Court explictly recognized that the separation of powers doctrine can act to restrain *executive* authority to promulgate rules, since that authority derives solely from a legislative grant.[125]

The Kentucky Supreme Court took a slightly different approach to the separation of powers principle in its analysis of the legislative veto.[126] The legislative oversight procedure enacted by the Kentucky General Assembly provided that no rule promulgated by an administrative body could become effective until it had been approved by the seven-member Legislative Research Committee (LRC), or until it had been placed before and not rejected by the General Assembly.[127] The statute also required that the LRC submit the rules to the Administrative Regulation Review Subcommittee for determinations as to whether the rules conformed to the statutory authority under which they were promulgated and as to whether they furthered the legislative intent.[128]

Although finding the adoption of administrative rules within the constitutional purview of the executive branch of government, the Kentucky Supreme Court held that the review of such rules to determine if they comport with statutory authority and if they carry out the legislative intent was a judicial function.[129] As a result, the court concluded that the agency rule review scheme was an unconstitutional violation of separation of powers.[130]

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121. *Id.* at 560, 431 A.2d at 788.

122. *Id.*

123. *Id.* at 557, 431 A.2d at 786.

124. *Id.* at 559, 431 A.2d at 787.

125. *Id.*, 431 A.2d at 787–88 ("Far from violating the separation of powers doctrine, the proposed statute actually buttresses the underlying delegation of rulemaking authority by restricting the extent to which the executive branch can engage in unilateral lawmaking.").

126. Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984).

127. KY. REV. STAT. § 13.085(1) (1972), *repealed by* 1984 Ky. Acts 1117.

128. KY. REV. STAT. § 13.087(4) (1972), *repealed by* 1984 Ky. Acts 1118.

129. Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 919 (Ky. 1984). *See also* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959–67 (1983) (Powell, J., concurring), *supra* text accompanying notes 69–72. *Cf.* Rankin-Thoman, Inc. v. Caldwell, 42 Ohio St.2d 436, 329 N.E.2d 686 (1975), *infra* text accompanying notes 137–41.

130. Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 919 (Ky. 1984).

V. Legislative Review of Agency Rules in Ohio

The Ohio General Assembly's initial legislative foray into the morass of an ever-expanding state bureaucracy was the enactment of the Ohio Administrative Procedure Act in 1943.[131] The Act provided a uniform procedure for administrative agencies to perform their two primary functions: the promulgation and amendment of rules, or "quasi-legislative" action;[132] and the enforcement of these rules through "quasi-judicial" action.[133] The Act also granted the judiciary appellate jurisdiction over both quasi-legislative and quasi-judicial agency actions.[134] Thus, the legislature clearly viewed judicial review as the appropriate check on bureaucratic excess by the executive branch.

Several decisions of the Ohio Supreme Court, however, construed provisions of the Ohio Constitution that grant courts of common pleas jurisdiction over "proceedings of administrative officers and agencies"[135] as limiting the courts' jurisdiction to the review of quasi-judicial agency action.[136] In *Rankin-Thoman v. Caldwell*,[137] the court concluded that the sole purpose and effect of the section of the Ohio Administrative Procedure Act that permitted judicial review of the adoption, amendment, or recission of administrative rules[138] was to permit judicial review of quasi-legislative proceedings.[139] In light of the precedent proscribing judicial review of agency promulgation and amendment of rules,[140] that section of the Act was declared unconstitutional.[141]

Rankin-Thoman sparked legislative concern that agency rulemaking decisions could go completely unchecked. In response, the state's first legislative veto provision, House Bill 257, was passed by the Ohio General Assembly and became effective on October 10, 1977, after going unsigned by the Governor.[142] As a result,

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131. 1943 Ohio Laws 358 (codified as amended at Ohio Rev. Code Ann. §§ 119.01–.12 (Page 1984 & Supp. 1986)). *See generally* Note, *A Survey of the Ohio Administrative Procedures Act*, 22 Clev. St. L. Rev. 320 (1973); Note, *A Comparative Analysis of the Federal and Ohio Administrative Procedure Acts*, 24 U. Cin. L. Rev. 365 (1955).

132. *See* Ohio Rev. Code Ann. § 119.03 (Page 1984 & Supp. 1986) (requiring rulemaking agencies to hold a public hearing prior to the adoption of rules and to provide public notice for such hearings).

133. *See* Ohio Rev. Code Ann. § 119.06 (Page 1984 & Supp. 1986) (making most agency adjudication orders valid only when an opportunity for a hearing is afforded prior to the adjudication order).

134. *See* Ohio Rev. Code Ann. § 119.11, *repealed by* 1975 Ohio Laws 2399. Section 119.11 stated in part:

> Any person adversely affected by an order of an agency . . . may appeal to the Court of Common Pleas of Franklin County on the grounds that said agency failed to comply with the law in adopting, amending, rescinding, publishing, or distributing said rule, or that the rule as adopted or amended by the agency is unreasonable or unlawful or that the rescission of the rule was unreasonable or unlawful.

1943 Ohio Laws 358, 365. *See also* Ohio Rev. Code Ann. § 119.12 (Page 1984 & Supp. 1986) (permitting any party adversely affected by an agency adjudication order to appeal the order in a court of common pleas).

135. Ohio Const. art. IV, § 4(B).

136. *See* DeLong v. Board of Ed., 36 Ohio St.2d 62, 303 N.E.2d 890 (1973); Burger Brewing Co. v. Liquor Control Comm'n, 34 Ohio St.2d 93, 296 N.E.2d 261 (1973); M.J. Kelley Co. v. Cleveland, 32 Ohio St.2d 150, 290 N.E.2d 562 (1972); Fortner v. Thomas, 22 Ohio St.2d 13, 257 N.E.2d 371 (1970); *and* Zangerle v. Evatt, 139 Ohio St. 563, 41 N.E.2d 387 (1942).

137. 42 Ohio St.2d 436, 329 N.E.2d 686 (1975).

138. *See supra* note 134.

139. Rankin-Thoman, Inc. v. Caldwell, 42 Ohio St.2d 436, 438, 329 N.E.2d 686, 688 (1975).

140. *See supra* note 136.

141. Rankin-Thoman, Inc. v. Caldwell, 42 Ohio St.2d 436, 438, 329 N.E.2d 686, 688 (1975).

142. 177 Ohio Laws 2230. In the previous general assembly, a similar measure had been approved with overwhelming support in both the House of Representatives (86 to 1), 136 Ohio House J. 670 (1975); and the Senate (24 to 7), 136 Ohio Senate J. 1159 (1975). The legislation, however, was vetoed by the governor as obliterating the historical

Ohio became the thirty-fourth state in the nation to enact a statute granting the legislative branch responsibility for oversight of the promulgation, amendment, and rescission of agency rules.[143]

House Bill 257 created the Joint Committee on Agency Rule Review (JCARR),[144] which was designed to vest the Ohio General Assembly with more control over the substance of rules promulgated by administrative agencies. Under the statutory framework originally outlined in House Bill 257 and refined through subsequent amendments, state agencies[145] are required to file proposed rules with JCARR at least sixty days before their scheduled adoption.[146] After conducting a hearing, JCARR may recommend the passage of a concurrent resolution invalidating the proposed rule or any part thereof.[147] Such a recommendation requires affirmative votes from six of the ten members of the committee.[148]

A recommendation for the passage of a concurrent resolution must be specifically based upon one of three grounds: (1) the rulemaking agency has exceeded the scope of its statutory authority; (2) the proposed rule conflicts with an existing rule adopted by the same or a different agency; or (3) the proposed rule conflicts with the legislative intent in enacting the statute under which the agency offered the rule.[149] These standards are intended to limit legislative review to serious rulemaking abuses by the agencies and to prevent the General Assembly from engaging in purely political rule review.[150]

If both houses of the legislature follow the recommendation of JCARR and approve a concurrent resolution, the agency may not promulgate any similar rule for the remainder of that session of the General Assembly.[151] If the legislature fails to pass a concurrent resolution within sixty days after the rule was originally filed with JCARR, the agency may adopt the rule as proposed.[152]

Since its inception in January 1978, JCARR has reviewed an estimated 25,000 proposed rules.[153] When comments and concerns are raised by JCARR, members of the legislature, or the general public, agencies typically prefer to revise, refile, or withdraw the rules rather than risk JCARR's recommendation of a concurrent

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distinction between the administrative function of the executive branch and the lawmaking function of the legislature. Governor's Veto Message, 136 OHIO HOUSE J. 2042 (Nov. 12, 1975). An attempt to override the governor's veto was successful in the House, 136 OHIO HOUSE J. 2042 (1975), but failed in the Senate, 136 OHIO SENATE J. 2372 (1975).

143. 1983 Staff Report for the Joint Committee on Agency Rule Review, obtained from the Joint Committee on Agency Rule Review, Columbus, Ohio [hereinafter Staff Report].

144. OHIO REV. CODE ANN. § 101.35 (Page 1984 & Supp. 1986).

145. "Agency" is defined as any administrative or executive officer, department, division, bureau, board, or commission of the state government authorized by law to adopt, amend, or rescind rules, unless otherwise specifically provided. OHIO REV. CODE ANN. §§ 119.01(A), 119.02 (Page 1984 & Supp. 1985).

146. OHIO REV. CODE ANN. § 119.13(B) (Page 1984 & Supp. 1986).

147. OHIO REV. CODE ANN. § 119.03(I) (Page 1984 & Supp. 1986).

148. OHIO REV. CODE ANN. § 101.35 (Page 1984 & Supp. 1986). The committee consists of five members of the House of Representatives, as appointed by the speaker, and five members of the Senate, as appointed by the president. Not more than three members from each house may be of the same political party.

149. OHIO REV. CODE ANN. § 119.03(I) (Page 1984 & Supp. 1986).

150. Vierow, *The General Assembly's New Role in Agency Rule-Making*, 51 OHIO BAR ASS'N REP. 318, 319 (1978).

151. OHIO REV. CODE ANN. § 119.03(I) (Page 1984 & Supp. 1986).

152. OHIO REV. CODE ANN. § 119.03(D) (Page 1984 & Supp. 1986).

153. Interview with Philip E. Cole, Executive Director of the Joint Committee on Agency Rule Review, in Columbus, Ohio (January 6, 1987).

resolution.[154] In fact, the Ohio General Assembly has invalidated only seven rules since 1978.[155]

VI. The Viability of Legislative Review in Ohio

In declaring legislative veto provisions unconstitutional, courts have relied upon two grounds: the failure of a legislative act to comply with the formal requirements for enactment;[156] and the infringement by one branch upon the activities of a coordinate branch in violation of separation of powers principles.[157] Yet neither ground requires Ohio courts to reach the same conclusion when evaluating the constitutionality of Ohio's legislative veto mechanism.

A. *Presentment and Bicameralism Concerns*

According to the reasoning of the *Chadha* majority,[158] every exercise of power by the legislature must comport with the requirements of bicameralism and presentment[159] unless specifically excepted by the Constitution.[160] Yet this approach is misguided for three reasons.

First, the definition of legislative act employed in *Chadha*[161] and adopted by several state courts[162] is fundamentally flawed. As mentioned earlier, the characteristic "altering legal rights" does not distinguish in a functional sense actions of the legislature from those of coordinate branches.[163] In fact, the characteristic is significant only in the context of the antiquated doctrine of absolute nondelegation.[164] As a practical matter, however, this doctrine is incompatible with the modern world in which government is looked upon for solutions to an increasing number of pressing economic and social issues. If Ohio's administrative agencies are prohibited from exercising any discretion in implementing legislative policy, the General Assembly would be forced to legislate with overwhelming specificity. Moreover, the General

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154. Staff Report, *supra* note 143.

155. *Id.* (Rules 5101:1-33-03 and 06 of the Department of Public Welfare (Senate vote: 32-0, April 3, 1979; House vote: 92-0, April 4, 1979); Rule 3901-1-14 of the Department of Insurance (House vote: 72-18, September 29, 1981; Senate vote: 25-7, October 6, 1981); Rule 5101:2-31-07 of the Public Welfare (Senate vote: 31-0, September 8, 1982; House vote: 93-0, September, 8, 1982); Rules 4101:2-4-01 and 4101:2-14-09 of the Board of Building Standards (Senate vote: 29-4, November 10, 1982; House vote: 80-0, November 10, 1982); part of section (D)(1)(b) of Rule 5101:2-33-04 of the Department of Public Welfare (Senate vote: 33-0, January 3, 1983; House vote: 92-0, January 3, 1983)).

156. *See supra* text accompanying notes 61–68, 91–102.

157. *See supra* text accompanying notes 54–59, 69–72, 103–30.

158. *See supra* text accompanying notes 61–68.

159. *See* Ohio Const. art. II, § 15(A) ("[N]o bill shall be passed without a concurrence of a majority of the members elected to each house."); Ohio Const. art. II, § 15(E) ("Every bill which has passed both houses of the general assembly . . . shall be presented forthwith to the governor for his approval.").

160. Two provisions of the Ohio Constitution permit the exercise of legislative power without resort to presentment and bicameralism. *See* Ohio Const. art. II, § 8 ("Each House has all powers necessary . . . to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, . . . and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers."); Ohio Const. art. II, § 23 ("The house of representatives shall have the sole power of impeachment. . . . Impeachments shall be tried by the senate . . . .").

161. *See supra* text accompanying notes 61–65.

162. *See supra* text accompanying notes 93–94, 96, 101.

163. *See supra* text accompanying note 82.

164. *See supra* text accompanying notes 85–87.

Assembly's ability to compromise, by using generalities in order to accommodate opposition, would be severely restricted. As a result, the legislature's responsiveness to issues of concern to the general populace would be severely diminished. The reinvigoration of the doctrine of absolute nondelegation, therefore, would represent a political choice to reduce government effectiveness.[165]

Moreover, Ohio courts have recognized that strict adherence to absolute nondelegation would result in abortive government.[166] While one branch's powers should not be directly or completely administered by either of the other branches,[167] the limited delegation of powers has been approved as a matter of public exigency.[168] Thus, the rejection of a restrictive definition of legislative acts promotes government efficiency and maintains the traditional relationship in Ohio between the coordinate branches of government.

Second, the contention that all exercises of power by the legislature must comply with presentment and bicameralism unless specifically excepted by the constitution is a gross oversimplification.[169] There are several instances in which legislative power is permissibly exercised outside the scriptures of presentment and bicameralism. For example, in conducting investigations affecting legislative action, each house of the legislature as well as individual committees have authority to subpoena witnesses and to require the production of books, papers, and records, to administer oaths to witnesses, to punish witnesses for contempt, to provide immunity for witnesses, and to reimburse witnesses for mileage and fees.[170] Clearly, therefore, not all actions taken by the Ohio General Assembly must comply with the presentment and bicameralism requirements.

In addition, the Ohio General Assembly has the recognized authority to *review* agency rules without resort to presentment and bicameralism.[171] Although the exercise of legislative power in Ohio is restricted to situations in which the "public safety, public interest, or public convenience shall demand it,"[172] the legislature has

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165. *See* Pierce & Shapiro, *supra* note 41, at 1205.

166. *See* Bogen v. Clemmer, 125 Ohio St. 186, 180 N.E. 710 (1932).

> [I]t always has been and always will be the policy of our government, national and state, to keep distinct and separate our legislative, judicial and executive departments of government, so that each may operate as a check and balance upon the other; but government would prove abortive if it were attempted to follow such policy to the letter. State agencies and public officials, regardless of classification, could not function if this rule were strictly followed . . . .

Id. at 189, 180 N.E. at 711.

167. *See* State *ex rel.* Bryant v. Akron Metro. Park Dist., 120 Ohio St. 464, 473, 166 N.E. 407, 410 (1929) ("The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments . . . .").

168. *See Ex parte* Bevan, 126 Ohio St. 126, 184 N.E. 393 (1933).

> It would not be necessary to go beyond the confines of Ohio to find scores of instances where in one branch of government has been invested with the powers of another. This departure [from the doctrine of absolute nondelegation] had to be made as a matter of public exigency.

Id. at 135, 184 N.E. at 397.

169. *See supra* text accompanying notes 83–84.

170. OHIO REV. CODE ANN. §§ 101.41–.46 (Page 1984).

171. *See* Note, *Legislative Veto in Ohio: The "Twilight Zone of Distinction,"* 9 U. DAYTON L. REV. 557, 578–79 (1984).

172. Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 686 (1853).

the constitutional authority under this "police power" to confer quasi-legislative power upon an agency.[173] The only limitation upon the legislature's power to delegate authority to administrative agencies is that the statutes contain "specific guidelines," thereby preventing the agency from exercising the "whole power" of the legislature.[174] Since the authority to oversee the promulgation of agency rules is within the specific guidelines requirement, legislative review of agency rulemaking simply implements the constitutional requirements mandated when the legislature delegates authority to an administrative agency.[175]

It has been suggested, however, that legislative *invalidation* of agency rules is an impermissible violation of Ohio's presentment clause.[176] The contention is that the invalidation of an agency rule by concurrent resolution is tantamount to amending or repealing an existing statute without presentment to the governor.[177] It is also claimed that the definition of a joint resolution under article II of Ohio's Constitution, as it has been interpreted by the judiciary, precludes the General Assembly from taking legislative action by adopting a joint resolution.[178]

This argument assumes, however, that agency rules have the full force and effect of law in Ohio from the moment of promulgation. In fact, agency rules do not take effect until sixty days after the rule was originally filed with JCARR.[179] Between the time they are filed with JCARR and the end of the sixty-day period, the rules have no legal effect whatsoever. Thus, equating the invalidation of an agency rule with the amendment or repeal of an existing statute is totally inappropriate.[180] Indeed, "invalidation" is a misnomer; "denied effectiveness" is a more appropriate term for the effect of a concurrent resolution's adoption.

The final reason for rejecting the approach of the *Chadha* majority is that the Ohio procedure for the promulgation and review of agency rules furthers the underlying functions of the presentment and bicameralism requirements. These functions are protecting the executive branch from intrusions by the legislature; protecting the people from imprudent laws; and ensuring the exercise of legislative

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173. *See* Note, *supra* note 171, at 579. The public necessity of allowing the coordinate branches of government to function efficiently implicates the police power. A statute enacted under this police power is presumed to be constitutional, unless its enactment encroaches upon the express constitutional authority of another branch of government. *See* State *ex rel.* Jackman v. Court of Common Pleas, 9 Ohio St.2d 159, 224 N.E.2d 906 (1967). Since the executive branch does not possess any express constitutional quasi-legislative authority, legislative review of agency rules is constitutional.

174. *See* Belden v. Union Cent. Life Ins. Co., 143 Ohio St. 329, 55 N.E.2d 635 (1944).

> [L]egislative acts granting to a board or an administrative agency quasi-legislative or quasi-judicial power, have been uniformly sustained where the General Assembly has laid down the policy and established the standards while leaving to an administrative agency the making of subordinate rules within prescribed limits and the determination of facts to which the legislative policy is to apply.

Id. at 342, 55 N.E.2d at 635.

175. *See* Note, *supra* note 171, at 579.

176. *Id.* at 579–80.

177. *Id.* at 580.

178. *Id. See also* OHIO CONST. art. II, § 15(F) ("Every joint resolution which has been adopted in both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for adoption have been met . . . ."); Cleveland Terminal & Valley R.R. v. State *ex rel.* Atty. Gen., 85 Ohio St. 251, 97 N.E. 967 (1912) (a joint resolution may only be used in an advisory function).

179. *See supra* text accompanying notes 144–52.

180. *See also supra* text accompanying notes 79–81.

power only after two separate opportunities for study and debate.[181] In Ohio, the executive branch does not possess any independent or inherent constitutional authority over the quasi-legislative activity of rulemaking; agencies can only exercise those powers conferred by the legislature.[182] Thus, the legislature's decision that the agency has exceeded the scope of its statutory authority or that the proposed rule conflicts either with an existing rule or with the underlying legislative intent[183] is no more an intrusion into executive branch functions than an amendment or repeal of the enabling statute, reductions in agency budgets, or disapproval of prospective executive appointments.[184]

Furthermore, Ohio's rule review process is explicitly designed to facilitate public involvement and participation in the promulgation, amendment, and rescission of agency rules.[185] The special expertise in the complex area of rulemaking acquired by members of JCARR also protects the public. In addition, the effectiveness of a proposed agency rule will be postponed only upon action by both houses of the General Assembly.[186] Moreover, the statute establishing Ohio's procedure for legislative review of agency rules was enacted in accordance with the presentment requirement.[187]

B. *Separation of Powers*

Although the Ohio Constitution does not contain an express provision forbidding one branch of government from exercising powers essential to the other branches,[188] the constitution's specific allocation of powers to each branch of government reflects a purpose that the powers and duties of each branch should be separate.[189] Furthermore, the Ohio Supreme Court has consistently reaffirmed that the doctrine of separation of powers is implied in the Ohio Constitution.[190]

Yet the separation of powers in Ohio has not been a static or rigid doctrine; over time it has reflected varying shifts in influence among the branches.[191] In general,

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181. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

182. *See In re* Milton Hardware Co., 19 Ohio App.2d 157, 160, 250 N.E.2d 262, 265 (1969) ("An administrative agency can exercise only such jurisdiction and powers as conferred upon it by the constitution or statute which created it or vested it with such power.").

183. *See supra* text accompanying note 149.

184. *See supra* text accompanying note 3.

185. *See supra* note 132 and text accompanying note 154.

186. *See supra* text accompanying note 151.

187. *See supra* text accompanying notes 142–43.

188. *Cf.* W. VA. CONST. art. V, § 1 ("The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . . .").

189. *See* State *ex rel.* Montgomery v. Rogers, 71 Ohio St. 203, 73 N.E. 461 (1905).

> [T]he fact that these governmental powers have been severally distributed by the constitution to the legislature, executive, and judicial departments of our state government, clearly evidences a purpose that the powers and duties of each shall be separate from and independent of the powers and duties of other co-ordinate branches.

Id. at 216–17, 73 N.E. at 462.

190. *See, e.g.*, Fairview v. Giffee, 73 Ohio St. 183, 76 N.E. 865 (1905); City of Zanesville v. Zanesville Tel. & Tel. Co., 64 Ohio St. 67, 59 N.E. 781 (1901).

191. When Ohio was a territory, an appointed territorial governor ruled with absolute veto power over a territorial legislature. Under the state's first constitution, adopted in 1802, executive, legislative, and judicial powers were vested in different departments—the legislature having superior powers, the judiciary significant authority, and the executive very slight powers. Ohio's second constitution, adopted in 1851, drastically curbed the power of the legislature, enhanced

influence among the branches has varied depending upon one of two factors. The first has been the need to control the power of the respective branches in order to prevent the concentration of power in any one branch. As Thomas Jefferson wrote, the basis of all free government is that "the powers of government should be so divided and balanced among several bodies of magistry, as that no one could transcend their legal limits, without being effectively checked and restrained by the others."[192] The second factor has been the allocation of governmental powers to facilitate the effective operation of the state's political machinery.[193]

These underlying interests are not threatened by Ohio's procedure for legislative review of agency rules. The restrictive nature of Ohio's procedure precludes the concentration of power in the hands of the legislature. The Ohio General Assembly must base any exercise of oversight power upon explicit statutory standards.[194] Thus, the Ohio legislature lacks the sweeping "revoke at will" power found objectionable in other contexts.[195]

Moreover, legislative review of agency rule promulgation is necessary in Ohio in order to prevent excessive concentration of power in the executive branch. As a result of the series of Ohio Supreme Court decisions ending with *Rankin-Thoman*,[196] the judiciary only has jurisdiction over agency adjudications; it may not review agency rulemaking decisions. If the legislature is barred from review as well, the executive would be vested with considerable lawmaking power, since each promulgated rule would have the full force and effect of law, and would also be beyond review by either coordinate branch. Such an allocation of governmental power would clearly be in violation of the separation of powers principle.[197]

Furthermore, the current procedure for legislative review of agency rulemaking decisions promotes governmental efficiency. The delegation to administrative agencies of authority to promulgate rules permits the Ohio General Assembly to avoid becoming bogged down in policy details and instead to rely upon the technical expertise of agencies. Moreover, the legislative review of agency rulemaking decisions invests the process with political accountability. Without some oversight, the "headless fourth branch of government" would have authority to legislate at will, free from any political restraints.[198]

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the independence of the judiciary, and left the executive largely a figurehead. Under an amendment approved in 1912, the governor was granted veto power, legislative powers were checked by the executive veto and by the reservation to the people of the right to enact laws through initiative and referendum, and the judicial power to declare laws unconstitutional was somewhat restricted. For a more thorough review of the historical development of the Ohio Constitution, see Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. CIN. L. REV. 191 (1939).

192. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (W. Peden ed. 1955).

193. *See* Note, *supra* note 171, at 574–75.

194. *See supra* text accompanying notes 149–50.

195. *See supra* text accompanying notes 108–12.

196. 42 Ohio St.2d 436, N.E.2d 686 (1975). *See supra* text accompanying notes 135–41.

197. *See supra* text accompanying notes 188–90, 192.

198. Schwartz, *The Legislative Veto and the Constitution—A Re-examination*, 46 GEO. WASH. L. REV. 351, 353 (1978).

VII. Conclusion

In evaluating the constitutionality of Ohio's procedure for legislative review of agency rules, Ohio courts should be wary of following lockstep the reasoning of those courts that have held other legislative veto provisions unconstitutional. One basis for these holdings has been the characterization of the exercise of such a veto as a legislative act and thus subject to the constitutional requirements of presentment and bicameralism. Yet this characterization is problematic. The definition of legislative act used in reaching these conclusions is functionally inadequate and also has the undesirable result of resurrecting the doctrine of absolute nondelegation. Furthermore, not all actions of the legislature must comport with presentment and bicameralism. Moreover, the exercise of a legislative veto is not the equivalent of the promulgation of a rule by an administrative agency. Agency rules are valid only to the extent they comply with the underlying legislative grant of authority just as statutes are valid only to the extent they comply with the constitution. The legislative review of agency rules in Ohio, therefore, is more closely analagous to judicial review of statutes.

The other basis for finding legislative veto provisions unconstitutional has been the separation of powers principle. Yet before rushing headlong down the path that courts in other jurisdictions have blazed, Ohio courts should pause to consider Ohio's distinguishing considerations. The Ohio procedure for legislative review is unique in its structure. The legislature is not empowered with broad "revoke at will" authority. Instead, discrete and finite circumstances have been articulated in which the legislature may preclude agency rules from taking effect. In addition, the Ohio Supreme Court has held that judicial review of agency rulemaking decisions is unconstitutional. Without legislative oversight of the promulgation of rules by administrative agencies, the executive branch would acquire inordinate powers. The present system for review of agency rules offers a needed measure of control over the "headless fourth branch of government." Ohio courts need not, indeed should not, follow the course laid down by other courts and declare Ohio's legislative veto procedure unconstitutional.

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